IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 245 of 1996

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)
Versus
VAGHARI PUNA MANDONBHAI SOLANKI - Opponent(s)

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Appearance :
MR PD BHATE, APP, for Appellant(s) : 1,
MR YN RAVANI for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 20/11/2007

ORAL JUDGMENT

This appeal has been filed by the State challenging the judgment and order dated 30th December 1995 passed by the Judicial Magistrate,

First Class, Bagasara in Criminal Case No.302/91.

2. The respondent was charged under section 409 and 477 of the Indian Penal Code. During the course of trial, it appears that the respondent gave a purshis Ex.65 stating, inter alia, that he is interested in getting the benefit of probation and he would,therefore, not contest the trial. It appears that before the respondnet filed the said application, Probation Officer's report was already called for.

3. On the basis of the application Ex.65 filed by the respondent, the learned Trial Judge though convicted him on pleading guilty, granted him the benefit of probation and did not impose any substantive sentence. It is this order that the State has challenged in the present appeal.

4. Learned advocate Shri Ravani for the respondent, at the outset, raised a question of jurisdiction of this Court to entertain the appeal. He submitted that the Trial Court has not passed any order of sentence which can be enhanced by this Court. What the Trial Court has done is to grant the benefit of probation to the respondent under the provisions of the Probation of Offenders Act. He drew my attention to the provisions contained in section 11 of the Probation of Offenders Act and in particular sub-section (2) thereof. Sub-section (2) of section 11 of the Probation of Offenders Act reads

as follows:-

> "11. Courts competent to make order under the Act, appeal and revision and powers of the courts in appeal and revision :-
>
> (1) ....
>
> (2) Notwithstanding anything contained in the Code, where an order under section 3 or section 4 is made by any court trying the offender (other than a High Court), an appeal shall lie to the court to which appeals ordinarily lie from the sentences of the former court."

It is therefore the contention of the learned counsel Shri Ravani that the judgment having been rendered by the Judicial Magistrate, First Class, Bagasara, the appeal would lie to the Sessions Court and not to the High Court. In support of his contention, he placed reliance on a decision of this Court in the case of **State of Gujarat v. Kharva Gabha Mavji,** reported in 20 GLR 959.

5. Having heard the learned advocates appearing for the parties and having perused the above mentioned decision in the case of **Kharva Gabha Mavji** (supra), I find that the contention of the counsel for the respondent is required to be accepted. In para 4 of the said decision, the learned Judge made the following observations:-

> "Sub-sec. (2) of sec.11 of the Act begins with a non-obstante clause and lays down that appeals from orders which are passed under sec.3 or sec.4 giving benefit to the accused under the

> Act would lie to the court to which the appeals ordinarily lie from the sentence of the former court. There is no dispute that in the instant case ordinarily the appeal from sentence of the trial court would lie to the Sessions Court and not to this court and, therefore, the proper forum for the State to challenge the order passed under sec.4 of the Act would be the Sessions Court as provided under sub-section(2) of sec.11 of the Act by way of an appeal challenging the order passed giving benefit of the provisions of sec.4 of the Act to the accused and not by way of an appeal of enhancement of sentence to this Court provided under sec.377 (1) of the Code, as has been done in the instant case.

Under the circumstances, it is clear that this appeal is not maintainable. It would have been open for this Court, perhaps, to direct that this appeal itself be remitted to the competent Sessions Cort for consideration in accordance with law. In the present case, however, I do not propose to adopt such a course. There are peculiar facts which prompt me to do so.

6. The benefit of probation was granted to the accused as far back as in the year 1995. 12 long years have passed since then. Since the appeal itself is not competent, I am not commenting on the legality of the order granting benefit of probation. However, I cannot ignore the fact that Ex.65 application given by the respondent, original-accused does not appear to be an unconditional plea of guilt. In his application, he had stated, inter alia, that he is aged about 26 years and he has not

admitted the charges. However, on account of his extreme poverty and responsibility to sustain his family including his children, he is inclined to accept the guilt if he is granted probation. As noted earlier, by the time he filed the application on 7th December 1995, Probation Officer's report was already called for. Referring to the contents thereof in his application Ex.65, the accused stated that as per the recommendation of the Probation Officer, he has already deposited the amount allegedly misappropriated by him. In conclusion, he stated that considering the overall circumstances, he may be given benefit of probation for which he is giving the purshis.

7. It would thus appear that the application Ex.65 was not an unconditional admission of the guilt by the accused. Under the circumstances, taking an overall view of the matter and considering that the accused is also lost his service with the Postal Department and much time has passed, this appeal is dismissed for want of jurisdiction without any further order.

(Akil Kureshi, J.)

(vjn)